170

(3)

Supreme Court, U.S.
FILED
AUG 30 2010
OFFICE OF THE CLERK

No. 09-1328

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

ROBERT S. VASQUEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
BRANDON J. LESTER
Deputy Solicitor
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer
@ohioattorneygeneral.gov

Counsel for Petitioner

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 1

A. The Sixth Circuit exceeded its limited AEDPA powers in finding that the state appeals court decision was contrary to law 1

1. The Sixth Circuit failed to defer to the Ohio appeals court's examination of the first prong of the *Strickland* analysis 2

2. State courts do not act contrary to federal law when they use imprecise shorthand in restating legal standards 3

B. The state appeals court reasonably concluded that Vasquez did not receive ineffective assistance of counsel 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Gray v. Branker,
529 F.3d 220 (4th Cir. 2008) 3, 7

Holland v. Jackson,
542 U.S. 649 (2004)..... 3, 4, 5, 7

Moody v. Polk,
408 F.3d 141 (4th Cir. 2005) 2, 3, 7

Payne v. Bell,
418 F.3d 644 (6th Cir. 2005) 4

Schultz v. Page,
313 F.3d 1010 (7th Cir. 2002)..... 4

Strickland v. Washington,
466 U.S. 668 (1984)..... *passim*

Williams v. Taylor,
529 U.S. 362 (2000)..... 6

Woodford v. Visciotti,
537 U.S. 19 (2002)..... 3, 4, 5, 7

Wong v. Belmontes,
130 S. Ct. 383 (2009)..... 10

Statutes, Rules and Provisions

110 Stat. 1214..... *passim*

INTRODUCTION

Respondent Robert Vasquez's brief in opposition makes two primary arguments. First, Vasquez claims that the Sixth Circuit properly reviewed his claim de novo under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, because the state appeals court applied the wrong ineffective-assistance standard, even though the state court correctly explained the standard elsewhere in its opinion. Second, he maintains that the Sixth Circuit, applying the right legal standard, properly determined that his trial counsel was ineffective. Vasquez is wrong on both counts. This Court should either summarily reverse or grant review of the Sixth Circuit's decision to ensure that federal courts adhere to AEDPA's limitations on habeas review.

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit exceeded its limited AEDPA powers in finding that the state appeals court decision was contrary to law.

To prevail on his claim of ineffective assistance of counsel, Vasquez must demonstrate both deficiency and prejudice—that is, (1) that his counsel's performance fell below an objective standard of reasonable competence, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a

breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

The Sixth Circuit made two critical mistakes when it reversed the Ohio appeals court's conclusion that Vasquez's counsel was not ineffective. First, the Sixth Circuit afforded no deference to the state court's analysis of the deficiency prong even though the state court at all times correctly recited and applied the law on that prong. Second, the federal court disregarded this Court's on-point holdings regarding the use of shorthand in restating legal standards, and improperly subjected the state court's conclusions on the prejudice prong to de novo review. Vasquez is not able to rebut these core points.

1. The Sixth Circuit failed to defer to the Ohio appeals court's examination of the first prong of the *Strickland* analysis.

Whatever may be said of the Ohio appeals court's analysis on the *prejudice* prong, the state court correctly identified and applied *Strickland*'s *deficiency* standard. App. 134a. Indeed, the Sixth Circuit found no error in the state court's deficiency evaluation. At the very least, then, the Sixth Circuit owed deference to the Ohio appeals court's deficiency analysis.

The Fourth Circuit's decision in *Moody v. Polk*, 408 F.3d 141, 146–47 (4th Cir. 2005), reaches exactly this conclusion. The *Moody* court held that, where a state court correctly applies *Strickland*'s deficiency prong but errs in its prejudice analysis, AEDPA deference still applies to the first half of the analysis.

Id.; see also *Gray v. Branker*, 529 F.3d 220, 228–38 (4th Cir. 2008).

Vasquez's only response on this point is that the Sixth Circuit gave "considerable deference to the state courts' findings" regarding deficiency but nonetheless "clearly determined that [trial counsel's performance] fell below any constitutionally permissive standard." Opp. at 22. But the Sixth Circuit nowhere suggested that it was affording AEDPA deference to the Ohio court's deficiency analysis, nor did the federal court explain how, if at all, the Ohio court unreasonably applied *Strickland*'s deficiency prong.

Because an individual must satisfy both the deficiency and prejudice prongs to demonstrate ineffective assistance, the Sixth Circuit erred in granting Vasquez relief at all, regardless of its conclusions on the prejudice prong. See *Strickland*, 466 U.S. at 697; *Moody*, 408 F.3d at 152. The Sixth Circuit's decision therefore warrants reversal on this ground alone.

2. State courts do not act contrary to federal law when they use imprecise shorthand in restating legal standards.

The Sixth Circuit only compounded its errors when it turned to the prejudice prong. As noted in the Petition, the Sixth Circuit paid short shrift to two on-point authorities from this Court. Pet. at 13–14 (citing *Woodford v. Visciotti*, 537 U.S. 19, 22–24 (2002) (per curiam); *Holland v. Jackson*, 542 U.S. 649, 654–55 (2004) (per curiam)). *Visciotti* and *Jackson* stand for the rule that state courts do not

act contrary to law simply because they use imprecise shorthand to restate a legal standard that is explained correctly elsewhere in the opinion. *Id.* By faulting the state appeals court for engaging in the exact same conduct, the Sixth Circuit ran afoul of this Court's holdings and exceeded its limited habeas authority.

Vasquez attempts to distinguish *Visciotti* and *Jackson* in several respects, but each of his arguments fails under scrutiny.

First, in discussing the purported analytical errors below, Vasquez focuses on the wrong state court opinion. On AEDPA review, federal courts examine only the last reasoned state court decision on the issue. See *Payne v. Bell*, 418 F.3d 644, 660–61 (6th Cir. 2005); *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002). Here that decision is the Ohio appeals court's opinion. App. 129a. Yet Vasquez, like the Sixth Circuit, persists in citing to the trial court's discussion of the issue as well. Opp. at 14–15; App. 15a. These improper citations exceed the scope of AEDPA review.

Second, Vasquez leans heavily on the fact that, after correctly reciting the prejudice test—whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694—the Ohio trial and appeals courts stated that Vasquez failed to show that "the outcome of his trial would have been different" and that none of his proposed witnesses "would have changed the outcome of his trial." Opp. at 15. He claims that these restatements varied so significantly from the

proper standard that the courts actually applied a different rule. Opp. at 18–21.

In making this argument, Vasquez tries to wall off *Visciotti* and *Jackson*, where only the word "reasonable" was omitted in the restatements of the "reasonable probability" prejudice standard. *Visciotti*, 537 U.S. at 22–24; *Jackson*, 542 U.S. at 654–55. He suggests that these cases illustrate specific instances of "permissible shorthand" in describing the prejudice prong, Opp. at 18, but that state court decisions using other formulations should not receive the same benefit of the doubt.

The Court's opinions do not support that crabbed reading. On the contrary, in both cases the Court explained that shorthand references must be read in context. If the state court decision, taken as a whole, reflects a proper understanding of the applicable standard, then stray uses of imprecise shorthand will not support federal-court invalidation. *Visciotti*, 537 U.S. at 23–24; *Jackson*, 542 U.S. at 655. The Court specifically admonished federal courts not to construe imprecise language in selective isolation, especially when "such a reading would needlessly create internal inconsistency in the opinion." *Jackson*, 542 U.S. at 654–55.

The Sixth Circuit made precisely this error: It viewed the Ohio appeals court's language in isolation and thereby created needless inconsistency in the court's opinion. The state court demonstrated that it understood the correct standard by citing it in full in the opinion. App. 134a. The shorthand language appears just a few pages later, App. 141a, with only a verbatim recitation of the trial court's factual

findings separating the two references, App. 135a–140a.

In the same vein, Vasquez argues that the state appeals court's language mimics a standard the Court said would be contrary to law in *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). Opp. at 20–21. But that comparison is apt only if the Ohio court's language is improperly taken in isolation. The state court's opinion as a whole demonstrates that the court knew and applied the correct standard.

That is not to say that a state opinion that once recites the correct standard will never be contrary to law. State courts of course may not insulate their decisions from collateral review by incanting magic words and then disregarding the correct standard.

But the Ohio court did not pay mere lip service to the proper *Strickland* prejudice standard; it also correctly applied that standard. After reciting the right rule, the state court reviewed in depth all of the factual findings from the post-conviction hearing. App. 134a–140a. The court noted that Vasquez presented several post-conviction witnesses who did not testify at trial. App. 141a. But the court explained that the simple fact that the witnesses were not called at trial does not establish prejudice; rather, the new evidence must cast some doubt on the outcome of the trial. *Id.* And the state court emphasized that Vasquez offered *no* substantive evidence to support his claim of innocence. *Id.*

Thus, the state court's conclusion—that Vasquez failed to cast any doubt on his conviction—is fully consistent with the *Strickland* standard of "a

probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Ohio court's opinion therefore should receive AEDPA deference.

Finally, Vasquez submits that run-of-the-mill ineffective-assistance cases fail to meet the standard for certiorari. Opp. at 24–25. But at the very least the Sixth Circuit has created a conflict with the Fourth Circuit's opinions in *Moody* and *Gray* that justifies this Court's review. More to the point, the opinion below runs directly contrary to *Visciotti* and *Jackson* and therefore warrants summary reversal.

B. The state appeals court reasonably concluded that Vasquez did not receive ineffective assistance of counsel.

The Sixth Circuit's decision perfectly illustrates the folly of failing to afford AEDPA deference. Even as it acknowledged the difficulty of engaging in de novo review of state proceedings based on a cold record, App. 21a, the Sixth Circuit proceeded to do so in an opinion that is distorted by hindsight and rife with second-guessing. Cf. *Strickland*, 466 U.S. at 689. Among other things, the Sixth Circuit's ineffective-assistance analysis overstates the importance of marginal witnesses and reads documentary evidence out of context. See Pet. 18–29.

Vasquez defends the decision by parroting the Sixth Circuit's conclusions that his counsel was ineffective for not investigating and introducing the evidence presented at Vasquez's post-conviction hearing. These claims do not survive scrutiny.

Both Vasquez and the Sixth Circuit label counsel deficient for failing to conduct a "reasonable investigation" in the case because he: (1) failed to speak to one witness (Becky Shaffer, Vasquez's sister-in-law), who would have led him to discover others (Tammy Salopek and Ashley Snyder); and (2) failed to follow up on perceived inconsistencies between the victim's (A.L.'s) account of the attack and notations on an emergency services (EMS) run sheet filled out weeks after the attack. Opp. 27–34; App. 24a–32a. Reviewing courts must examine the reasonableness of these decisions "from counsel's perspective at the time" and "apply[] a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690, 691. And all of counsel's actions must be evaluated in view of the fact that Vasquez chose not to waive his speedy trial rights, which gave counsel a limited period of time to conduct a complex examination. Sixth Circuit Joint Appendix ["J.A."] at 1356–58. Vasquez's strategic choice limited counsel's preparation time, and he must accept the consequences of that decision. See *Strickland*, 466 U.S. at 690–91.

Given these constraints, Vasquez's counsel made reasonable judgment calls about what actions would bear the most fruit at trial. The primary witness at issue, Becky Shaffer, had no direct information regarding the attack—she was asleep when it occurred. App. 165a. Thus, counsel could reasonably determine that she was not essential to his client's case. And both counsel and Vasquez attempted to get Vasquez's family (which included Shaffer) to cooperate, only to be rebuffed at each turn. App. 175a; J.A. 1371–72. Indeed, Vasquez

himself believed that his family had abandoned him. J.A. 1371–72.

Counsel can hardly be faulted for choosing not to spend more of his limited time chasing leads that appeared unlikely to yield useful information. And while Shaffer stated at the post-conviction hearing that she might have testified if counsel had pressed her to do so, counsel's actions are judged based on the information he had at the time, not in view of the full range of knowledge available later. See *Strickland*, 466 U.S. at 689.

Vasquez also faults counsel for failing to investigate more thoroughly an EMS run sheet containing the notation "pt. st. he put it in her." Vasquez argues that the statement exposes an inconsistency in A.L.'s story that Vasquez performed oral sex on her. Opp. 31–32; App. 29a–30a. But this objection stems from the Sixth Circuit's unsupported assumption that the ambiguous word "it" referred to Vasquez's penis. A.L. consistently alleged only that oral sex occurred, and the record supports the conclusion that A.L. used "it" to refer to Vasquez's tongue. See App. 158a–159a (A.L. testified that Vasquez touched both inside and outside her vagina with his tongue); J.A. 1138.

In any event, neither the omitted witnesses nor the EMS run sheet demonstrates prejudice. Vasquez claims that Shaffer would have highlighted various inconsistencies in the timeline of the attack, that A.L.'s father coached her to give certain information, and that A.L. was relaxed and excited by the attention she was receiving when she went to the hospital after reporting the attack. Opp. at 35. But the benefit of Shaffer's testimony would have

been limited. Shaffer admitted, for instance, that A.L. was relaxed because the emergency personnel were joking to make her comfortable. App. 165a–166a. And the marginal benefits of Shaffer's testimony would have been outweighed by its substantial downside: Specifically, Shaffer would have admitted that she took her own son to the hospital to determine whether Vasquez had sexually abused him. App. 166a.

Likewise, Vasquez claims that Salopek and Snyder could have testified that A.L. was relaxed weeks after the attack and that she often lied to get attention. Opp. at 35–36. But A.L. admitted as much in her own trial testimony. J.A. 665–66. The omission of cumulative evidence cannot demonstrate prejudice. See *Wong v. Belmontes*, 130 S. Ct. 383, 388–94 (2009). And although Vasquez claims that Snyder could have testified that A.L. may have gained some knowledge of sexual activities when she heard that Snyder was molested, Opp. at 36, Snyder said she was not even certain she told A.L. that information: "I talked to [A.L.'s] sister about it and I think [A.L.] was present. I am not sure, though." J.A. 1175.

Finally, Vasquez claims that the EMS run sheet shows that A.L. changed her story from oral sex to vaginal sex. Opp. at 34. But again, that is only true if the run sheet notation is divorced from the record.

Thus, the state appeals court did not commit any error in rejecting Vasquez's ineffective assistance claim, let alone unreasonable error under AEDPA. The Court should reverse the Sixth Circuit's contrary decision.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
*Counsel of Record
BRANDON J. LESTER
Deputy Solicitor
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner

August 30, 2010